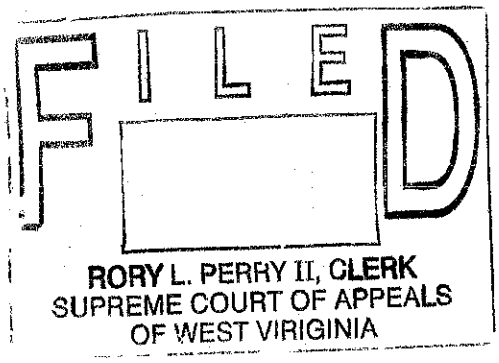
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 06-2157



UNITED BANK, INC., *et al.*,

Petitioners-Plaintiffs below

v.

STONEGATE HOMEOWNERS ASSOCIATION, INC., *et al.*,

Respondent-Defendant below

APPELLANTS' REPLY

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APPELLANTS' REPLY

Now come the Appellants, Joseph D. Stever and Bonnie M. Stever, by their counsel, and, under Rules 10 and 13 of the West Virginia Rules of Appellate Procedure, for their Reply state:

A. The UCIOA gives homeowners a cause of action to protect themselves

The Appellee rightly notes in its brief that the "Stevers latch onto [W. Va. Code § 36B-3-116(f)] which provides, '[a] judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party'." Appellee's Brief at 7-8. Indeed, W. Va. Code § 36B-3-116(f) is quite neutral in its application. It favors neither the homeowner nor the association and imposes no condition on the right of a party to recover her costs and reasonable attorney's fees when she prevails in "any action brought under" W. Va. Code § 36B-3-116.

Rather than to accede to this plain fact, the Appellee quickly loses its way with two remarkably baseless and false statements that form the entire theory of their argument. The Appellee argues that (1) "[t]he actions under [W. Va. Code § 36B-3-116(f)] relate only to those to enforce an association's rights" (*Id.* at 9) and (2) "[n]othing in [W. Va.] Code § 36B-3-116 authorizes a homeowner to take any action to *extinguish* liens; rather, it only grants the Homeowners Association a right of action to enforce the lien."[1] *Id.* (Emphasis original.)

These are absurdities. The Appellants as homeowners, in fact, initiated the underlying action and prevailed on Count II of it largely based on W. Va. Code § 36B-3-116.[2] If the Appellee's claim were true — that homeowners do not have a cause of action under W. Va. Code § 36B-3-116 to

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[1] The rest of the Appellee's brief amounts to padding these false points.

[2] The circuit court ruled that "the Association has not initiated a law suit against any of the Plaintiffs in this action. Therefore, because more than three years has lapsed since the full amount of each Plaintiffs' assessments became due, ***the liens are time barred pursuant to West Virginia Code § 36B-3-116(d)***"." Final Order at 16 (Emphasis supplied.)

extinguish unlawful liens — then how does the Appellee explain that the circuit court below, in fact, by decree extinguished the unlawful liens under W. Va. Code § 36B-3-116(d)?

Perhaps the Appellee's argument is based on the absence of textual authority in W. Va. Code § 36B-3-116 granting a homeowner a "right of action" to extinguish an unlawful lien. Yet, at the same time, a complete reading of W. Va. Code § 36B-3-116 demonstrates a corresponding absence of textual authority granting a homeowner's association a "right of action" to enforce a lawful lien.

Both positions are nonsense. A homeowner and a homeowners' association have coëxisting and coëxtensive rights to action for relief under W. Va. Code § 36B-3-116 because the UCIOA expressly creates them under W. Va. Code § 36B-1-113 and W. Va. Code § 36B-4-117 :

> (a) The remedies provided by this ***chapter*** shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed . . . .
>
> (b) Any right or obligation declared by this ***chapter*** is enforceable by judicial proceeding."
>
> W. Va. Code § 36B-1-113 (Emphasis supplied.)

"If a declarant or any other person subject to this ***chapter*** fails to comply with any of its provisions . . . . , any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief . . ." W. Va. Code § 36B-4-117 (Emphasis supplied.)

The Appellants obviously have a right of action under the UCIOA to enforce their rights and to protect themselves. Pursuing that right, the Appellants, in fact, obtained relief under W. Va. Code § 36B-3-116 when the circuit court extinguished the unlawful lien that the Appellee filed against the Appellants' home. It is far too late for the Appellee to challenge that result.

In short, the answer is in the text and the text is the answer.

B. Prevailing party has a meaning that must be given effect

The Appellee accuses the Appellants of "invading the legislative arena" and resorting "to claims that public policy supports their claims to attorneys fees". Appellee's Brief at 18. The Appellee's great delusion is that the Appellants, as the prevailing parties, have no textual basis to claim costs and attorney's fees..

The remedy of costs and attorney's fees is obviously mutual based on the existence of the term "for the prevailing party" in W. Va. Code § 36B-3-116(f). The point is underscored when the Court contemplates that the West Virginia Legislature could easily have enacted W. Va. Code § 36B-3-116(f) to limit the remedy only to an association: "A judgment or decree in any action brought by the association under this section must include costs and reasonable attorney's fees ~~for the prevailing party~~." The foregoing would have so far better effectuated the Appellant's interpretation of the mandatory fee-shifting provision that one wonders how its clarity was lost upon the legislators who enacted the UCIOA.

Belying the Appellee is that the alleged exclusivity of the remedy in W. Va. Code § 36B–116(f) does not even permit the mandatory award of costs and attorney's fees to a homeowner when a homeowners' association initiates — and loses — an action to enforce a lien against the homeowner.[3] The Appellee's extreme stand is a weak substitute for a textual basis in W. Va. Code § 36B-3-116(f). The Appellee's interpretation of the provision unavoidably renders the term "for the prevailing party" utterly meaningless.

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[3] This is no exaggeration of the Appellee's position: The Appellee is unconditional that the "plain language of the Act authorizes attorneys fees only to homeowner associations" and "[m]aking a homeowners' association pay attorneys fees is quite at odds with this legislative purpose . . . ." *See e.g.*, Appellee's Brief at 6, 9, 10 and 15.

If a homeowner cannot recover her costs and attorney's fees in any circumstance under W. Va. Code § 36B-3-116(f) , as the Appellee argues, then that term would exist for no purpose, an impossible result under the circumstances.

Accordingly, as the prevailing parties under W. Va. Code § 36B-3-116, the Appellants are entitled to costs and attorney's fees.

JOSEPH D. STEVER and **BONNIE M. STEVER**

By their counsel

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CERTIFICATE OF SERVICE

I, Mark A. Sadd, counsel for Appellants, certify that on the 12th day of February, 2007, I served the foregoing **APPELLANTS' REPLY** upon counsel for the Appellee by placing a true and correct copy thereof in the United States Mail, First Class Postage Pre-paid, addressed as follows:

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